Office-Supreme Court, U.S.
FILED
FEB 19 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 725

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1780, et al.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

JESSE FREIDIN
Attorney for Petitioner
598 Madison Avenue
New York 22, New York

HERBERT PRASHKER
MURRAY GARTNER
RICHARD H. BOROW
598 Madison Avenue
New York 22, New York
Of Counsel

TABLE OF CONTENTS

	PAGE
Need For The Writ	1
The Statute	5
Conclusion	6

TABLE OF AUTHORITIES

CASES:

House v. *Mayo*, 324 U. S. 42 (1945) 2

Hudson and Manhattan R. Co., 245 I. C. C. 415 (1941) 5

Northwest Airlines Inc. v. *Jackson*, 185 F. 2d 74 (8th Cir. 1950) 3

Ore Dock Foremen and Laborers, 246 I. C. C. 703 (1941) 5

Pan American World Airways Inc., 115 N. L. R. B. 493 (1956) 3

STATUTES:

Railway Labor Act, 45 U. S. C. §§ 151-188 (1958)

Section 151 5

Section 181 5

Section 182 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

PAN AMERICAN WORLD AIRWAYS, INC., *Petitioner,* v. UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1780, et al., *Respondents.*	No. 725

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

Need For The Writ

Respondent Culinary Workers Union argues that the decision of the Court of Appeals "settles finally, definitely and properly all questions involved" (CW. p. 16)* including, we assume, the question of whether an air carrier's space site employees are, or are not, covered by the Railway Labor Act. The other respondents appear to acknowledge "existing uncertainty" in that regard, but state that denial of the petition "would immediately end" it. (B&CT. p. 31). As we see it, the situation is precisely the converse of that

*The opposition brief of Culinary Workers Union, Local 226, is referred to as "CW", that of the remaining respondents as "B&CT."

described by respondents—the Court of Appeals decision has "settled" nothing either "finally" or "definitely," and "existing uncertainty" will not be ended by a denial of certiorari. On the contrary, it will be ended only if this Court grants certiorari and decides the merits.

The "existing uncertainty" is the result of conflicting positions of the Ninth Circuit and of the NMB on an important substantive issue concerning the coverage of the RLA. Nobody denies that a conflict exists over that issue and nobody denies that the issue is important. A denial of certiorari is, of course, not a decision on the merits of that issue [*E.g.*, *House* v. *Mayo*, 324 U. S. 42, 48 (1945)], will add no weight to the Court of Appeals decision, and will not resolve the existing conflict between the NMB and that court on the important issue involved.

Respondents suggest that the NMB *should* now bow to the Ninth Circuit's view of its jurisdiction, albeit the NMB was not itself a party to the proceeding. That would assuredly remove a good part of the conflict. But the NMB has yet to suggest that it will do anything of the kind. On November 15, 1963, ten days after the Ninth Circuit's decision, the Board's Executive Secretary stated that the Board had its position "under consideration" in light of the Court of Appeals' decision. (B&CT, p. 13a). Three months having now passed, the Board has not altered its determination of October 29, 1963 that the employees involved are subject to its jurisdiction.

There is, after all, no denying that the Court of Appeals decision is in irreconcilable conflict not only with the NMB's latest decision with respect to NRDS, but with the whole course of NMB decisions over a period of years respecting carrier employees not directly engaged in transportation. Respondents can offer no reason for assuming that the NMB will now abandon its long-term view of the reach

of the RLA, and of its own jurisdiction with respect to such employees, out of simple deference to the Ninth Circuit's view that the NMB has been wrong for at least the last eight years.* We know, in fact, that the NMB has not heretofore found a much earlier Circuit Court decision, on which the respondents so heavily rely, to be a compelling precedent, and the NMB, just like the NLRB, is free to adhere to its own views of statutory construction until this Court has spoken.

Moreover, on December 5, 1963, respondents filed a representation petition with the NLRB covering Pan Am's NRDS employees (B&CT, p. 19a) and the NLRB has yet to order a hearing. The NLRB, after all, has formally declined to exercise jurisdiction over petitioner's space site employees so long as the NMB does not decline to assert jurisdiction. *Pan American World Airways, Inc.*, 115 N. L. R. B. 493 (1956). The NMB is asserting jurisdiction here, and respondents have offered no reason to suppose that this Court's denial of Pan Am's petition for certiorari will cause the NMB to modify its position and dismantle eight years of administration of the Act.

In any event, it is clear that the underlying "jurisdictional issue" of which unions are to represent Pan Am's NRDS employees** cannot be resolved until it is authorita-

Northwest Airlines, Inc. v. Jackson, 185 F. 2d 74 (8th Cir. 1950).

**The District Court recognized that, in reality, the case involves a "jurisdictional dispute." Pet. App. A, p. 22a. Respondents have tried to suggest that the dispute involves the payment by Pan Am of "sub-standard" wages at NRDS. They say that the wage scales prescribed in collective bargaining agreements between several of them and various contractors [including Reynolds Electrical & Engineering Co. ("REECO")] at the Nevada Test Site (a geographic area of which NRDS is only a part) were certified as "prevailing wages" for *construction work* in that area under the Davis-Bacon Act; that REECO, in addition to being a *construction* contractor for the Nevada Test Site, was Pan Am's predecessor as a support services contractor at NRDS; and that Pan Am's contract with TWU pro-

tively determined whether the NMB or the NLRB has jurisdiction. The NLRB cannot include Pan Am's space site employees (assuming they are subject to the NLRA) in the same bargaining and voting unit as Pan's employees directly engaged in airline operations, who are clearly subject to the RLA. Conversely, if the space site employees are subject to the RLA, the NMB may, as it has done in the past with similar employees, include them in just such a carrier-wide bargaining and voting unit. (See App. A, pp. 32a-39a).

In sum, resolution of the "jurisdictional dispute" between the unions here requires resolution of the jurisdictional question as between the two statutes and the two agencies. Until that happens, Pan American—and its space activities—are in the middle of both "jurisdictional" disputes. So far as we can see, the decision below and this Court's denial of certiorari would settle only this: that the agency charged with defining carrier obligations under the RLA would hold that the Act applies, while a cognizant Court of Appeals when called upon to enforce the carrier's commensurate rights would hold that the Act does not apply. Further elucidation is required and, it is respectfully submitted, should come from this Court in this proceeding.

We respectfully suggest, furthermore, that, if the petition be granted, the Court ask the NMB and the NLRB to participate as *amici curiae*.

---

vides for lower rates of pay than those certified as "prevailing wages" under the Davis-Bacon Act for *construction work*. (B&CT, pp. 2-4). But what respondents have studiously neglected to point out is that *Pan Am does not perform construction work at NRDS subject to the Davis-Bacon Act* (Testimony of R. L. Yordy, transcript pp. 21-22; R. 282-83; see also, Pet. App. C, p. 71a), but *maintenance* services (Yordy, transcript p. 10; R. 271; see also, Pet. App. C, p. 70a) under a collective bargaining contract providing for *maintenance* rates of pay.

The Statute

To support their construction of Section 181 of Title 45 as being limited to air *transportation* employees (not air carrier employees), respondents point out that Section 151, Fifth, covering employees of *rail* carriers, states that an "employee . . . includes" any person "who performs any work defined as that of an employee . . . in the orders of the [ICC]". They then argue that "obviously, [the] I. C. C. would not be concerned with defining work of any employees other than those engaged in . . . the transportation of persons or property wholly by railroad." (B&CT, p. 22; see CW, p. 7).

The difficulty with the argument is that it seeks to engraft upon Section 181, covering *air* carriers, a limitation which Congress put in Section 151, applicable to *rail* carriers, but omitted from Section 181. It ignores the fact that the ICC has absolutely nothing to do with air carriers and does not have authority to define the work of air carrier employees or even air transportation employees.*

Section 182 makes plain that the substance of the relevant portions of the rail carrier provisions (including relevant portions of Section 151) are to be incorporated into the air carrier part *as made applicable by Section 181*. What respondents have done is to invert the statute to support their argument that Section 151, rather than Section 181, is determinative of RLA coverage of air carriers and their employees.

---

*The ICC has recognized that even as to railroad employees the NMB, not the ICC, has authority under the RLA to determine who are employees under the Act, the ICC's function being only to define the kind of work which those who are employees do. *Ore Dock Foremen and Laborers*, 246 I. C. C. 703 (1941). See also *Hudson and Manhattan R. Co.*, 245 I. C. C. 415, 420 (1941). And, as the petition establishes, the NMB has not limited the definition of employees of rail carriers exclusively to transportation workers. (Petition, pp. 20, 24).

Conclusion

There is an immediate and compelling need for the writ which respondents' briefs simply confirm. They do not deny that the question presented is a basic and important one in the administration of the Railway Labor Act—as they say, the resolution of that issue will determine the respective jurisdictions of the NLRB and the NMB. The question—one which has never been determined by this Court—arises in the context of a square conflict between the Court of Appeals for the Ninth Circuit and the NMB. We respectfully submit that the Court should now exercise its jurisdiction to determine it.

Dated: New York, New York
February 18, 1964.

Respectfully submitted,

JESSE FREIDIN
Attorney for Petitioner

HERBERT PRASHKER
MURRAY GARTNER
RICHARD H. BOROW
Of Counsel